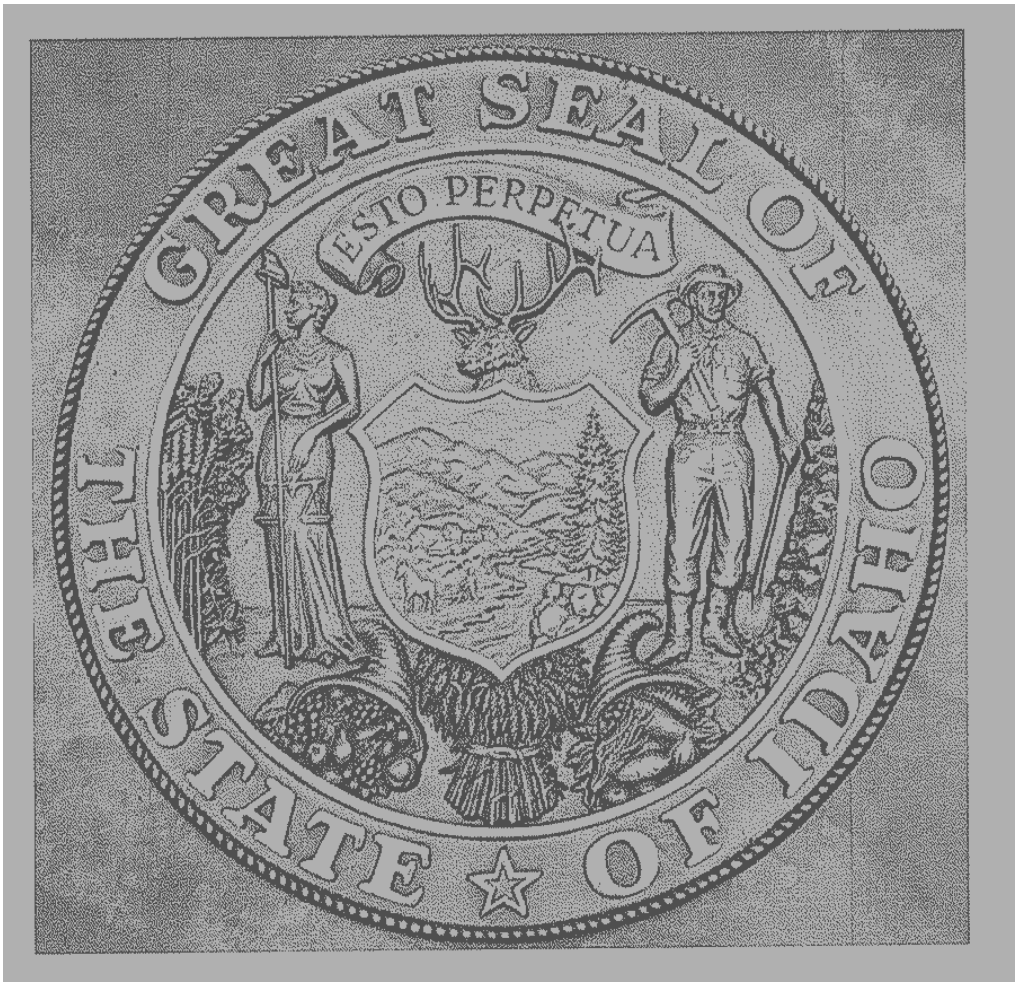
“RIGHT AND JUSTICE … WITHOUT DELAY”

Report of the Task Force on Idaho’s Court of Appeals:

The Next Quarter Century and Beyond



Submitted to the Idaho Supreme Court
and the Administrative Office of the Courts
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The Task Force recommends that the Court of Appeals receive resources sufficient to provide the judges time to write publishable opinions in more cases, thereby maximizing the guidance given to the bench, bar, and public. The Task Force also encourages the Court to proceed with its preliminary plan to enhance access to opinions that may continue to be "unpublished" in the future, by adding them to a special directory on the Court's website.

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The Task Force recommends that the Supreme Court adopt the ABA reference standards for the full duration of an appeal. As applied to the Court of Appeals, this would mean 75% of assigned cases decided within 290 days from the filing of the notice of appeal, and 95% within 365 days. These time periods would include a 185-day early time segment standard for getting an appeal from filing to the "at issue" stage. This early time segment standard, if enforced, would give the Court of Appeals a chance to satisfy the ABA standards for the aggregate lifecycle of cases assigned to it. Enforcement will require close attention by the Supreme Court and the Clerk's Office to every component of the early segment.

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The Task Force recommends the adoption of a tiered approach for filing appellate transcripts with the Supreme Court, taking into account the recommendations of the Court Reporters' Committee. The Court should adopt rule changes or suggest statutory changes, as needed, and should develop a strategy for strengthening court reporters' skills and reporting technology that will modernize this segment of the appellate process.

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The Task Force recommends that the Supreme Court adopt, and direct the Clerk's Office to enforce, a policy of allowing extensions of time for briefing, under the appellate rules, only when good cause is shown.

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The Task Force recommends that the Supreme Court adopt a guide to self- representation in the appellate courts, similar to the educational materials created by other appellate courts.

Introduction:
Idaho's Successful (but Stressed) Innovation

The Idaho Constitution, approved in 1890, provides, at Article I, Section 18, that state courts shall administer "right and justice ... without sale, denial, delay, or prejudice." Deciding cases carefully under the rule of law in order to deliver "right and justice," while also disposing of cases expeditiously in order to avoid "delay," has always been a challenge for courts with limited resources. In the 1970s, a growing appellate caseload caused "delay" to become an unfortunate fact of life in the Idaho Supreme Court. In 1976, Justice Charles R. Donaldson noted in a law review article that the Court had more than a year's backlog of cases, and that appeals were arriving faster than the Court could dispose of them.[1] Characterizing the situation as a "crisis," he recommended a solution in the form of a new "intermediate court of appeals." In 1977, a Court-appointed "blue ribbon" committee embraced the recommendation. A study group within the Office of Attorney General David Leroy reached a similar conclusion.

Yet no legislative action was forthcoming. By 1980 the duration of the average appeal to the Idaho Supreme Court – from notice of appeal to issuance of an opinion – had increased to approximately two years.[2] As the crisis swelled, the Idaho State Bar convened its own committee, calling it the "Idaho Committee to Find Solutions to Appellate Caseload Problems." The Bar Committee pointedly noted the human side of appellate delay, drawing upon actual instances reported to the Bar:

> It means that some convicted criminals walk free while their appeals are pending .... It means that some convicted persons who cannot post appeal bond sit in prison, only to have their convictions ultimately reversed.
>
> It means that heirs of an estate die before their inheritances are determined.... It means that farmers let fields sit idle while their lease and or contract rights are reviewed. It means that [business operators] who obtain judgments for commercial debts, and individuals who obtain judgments for personal injuries, teeter on insolvency during appeal or "settle cheap" to avoid further delay.[3]

The Bar Committee determined that Idaho's appellate process had become the slowest in the nation, that internal changes in the Supreme Court would not suffice to solve the problem, that a structural reform in the appellate system was required, and that any "intermediate" appellate court would continue to be resisted by policy-makers as another layer of judicial bureaucracy. The committee recommended a different kind of appellate court: a three-member Court of Appeals that would take cases by assignment from the

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[1] Charles R. Donaldson, *A Crisis in the Idaho Court System: An "Appealing Remedy"*, 13 Idaho Law Review 1 (1976).

[2] The average length of an appeal peaked at 838 days in 1982. *See* Idaho Courts Annual Report, pg. 3 (1982).

[3] *Idaho's Appellate System Scandal: The Record, the Controversy, and the Solution* (Report of the Idaho Committee to Find Solutions to Appellate Caseload Problems), February, 1980 (hereinafter cited as the "Bar Committee Report), at pg. 1.

Supreme Court. Focusing largely on error-correcting issues, the new Court of Appeals would cut into the backlog by operating essentially in tandem with the Supreme Court. The assignment mechanism would allow the caseloads of the courts to be planned and balanced as categories of appeals – civil, administrative, and criminal – grew at varying rates. Moreover, relatively few of the new Court's decisions would receive further, discretionary Supreme Court review, thereby allaying the "layer of bureaucracy" concern. This innovative relationship between the courts would nearly double the capacity of the appellate system.[4]

This new approach captured the support of the Legislature. The Idaho Court of Appeals was established by statute (Idaho Code sections 1-2401 through 1-2411) in 1980, and the Court received funding to begin operation in January, 1982. The impact on the appellate backlog was remarkable. Having been assigned 206 of the backlogged cases on its first day of operation in January, 1982, and 235 more cases during 1982, the Court of Appeals decided those cases, together with cases assigned in subsequent years, at a rate that resulted in just 21 cases awaiting opinion from the Court by the end of 1985.[5] During the same period, the delay in deciding all cases in Idaho's appellate system was cut by more than ten months. In his 1986 "State of the State" address, Governor John V. Evans lauded the combined work of the Supreme Court and Court of Appeals, describing the reduction of appellate delay as "one of the finest but least publicized accomplishments of the last decade."[6]

Time, of course, has marched on. The creators of the Court of Appeals recognized that a three-member court could not remain static while Idaho, and its appellate caseload, continued to grow. The Bar Committee predicted that the caseload would require expansion in the number of Court of Appeals judges during the decade of the 1990s. Yet today, a quarter-century after the Court began operation, the Court's size has not expanded. The Court has remained a three-judge tribunal while the number of cases assigned to it has increased from the original 206 at the beginning of 1982 to more than 500 per year today.

As discussed elsewhere in this report, the Court has coped as best it could with the caseload through admirable hard work as well as by utilizing occasional services of retired judges and other judges *pro tem*, and by employing procedures -- such as issuing unpublished opinions and dispensing with oral arguments even when the parties have not waived them – enabling the Court to increase the number of dispositions per judge. These procedures can be viewed as efficiencies, but they also represent caseload-induced compromises of basic appellate values such as conducting open dialogue with counsel for the parties, explaining the grounds for appellate decisions, and providing written guidance to the public, trial courts, and practitioners on the content and application of legal principles. Each of these basic appellate values is linked to the "right and justice" mandate of the state constitution.

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[4] The rest of the country has moved toward discretionary review by courts of last resort in tiered systems where "intermediate" appellate courts exist. *The Effects of Jurisdictional Change on Appellate Courts, Part II,* National Center for State Courts, p. 2. (1999).

[5] "Idaho's Court of Appeals – The First Four Years: A Portrait in Numbers," *The Advocate* (Idaho State Bar, April, 1986), at p. 14. The Court of Appeals was aided in this effort by judges *pro tem* drawn from the district courts and even from the Supreme Court.

[6] Carl F. Bianchi (author and editor), *Justice for the Times: A Centennial History of the Idaho State Courts* pp. 223-24 (Idaho Law Foundation, Inc., 1990).

The past quarter-century also has witnessed the rising importance of effective caseload management and use of technology. When the Bar Committee conducted its review of the nation's then-slowest appellate system, it noted that the system's performance could be improved in the early time segments of the appeals process -- primarily in the preparation of reporters' transcripts. The Bar Committee did not examine those early time segment issues in depth, due to the overriding need at the time to change the structure of the appellate system. Today, however, as explained in this report, the slow, antiquated process for completing these transcripts in most Idaho counties has emerged as a prominent reason for appellate delay. The problem demands remedial action; fortunately, it can be addressed through the application of modern technology and techniques of judicial administration.

In sum, at the quarter-century mark of the Court of Appeals, the time has arrived for renewed attention to the needs of Idaho's appellate system. The progress stimulated by the successful innovation of 1982 -- the creation of an assignment-based, caseload-sharing Court of Appeals – is now endangered. As detailed in this report, the Court as an institution is under stress, striving to prevent erosion of quality and timeliness under relentless caseload pressures. The system cannot continue to fulfill the dual constitutional mandates of delivering "right and justice" and avoiding "delay" unless the capacity of the Court of Appeals is brought into congruence with its caseload, and unless the early stages of the appellate process are modernized.

Investments of public resources will be required. The State of Idaho has many claims upon its resources; yet today, as was the case in the 1970s and early 1980s, the situation has become urgent. It calls for public-spirited advocacy by the Bar, and for the support of the legislative and executive branches of government. For the exponents of quality and efficiency in the administration of justice under law in Idaho, there can be no more fundamental issue than whether our appellate system will be equipped to deliver "right and justice" without "delay" in the next quarter-century.

The Quarter-Century Task Force: Membership, Process, and Conclusions

On February 9, 2007, the Idaho Supreme Court appointed a "Task Force on Idaho's Court of Appeals: The Next Quarter Century and Beyond." The Court entered the appointment order, attached to this report as an appendix, almost exactly 25 years after the Court of Appeals opened its doors. The Supreme Court charged the Quarter-Century Task Force to "study [the Court of Appeals'] current and future needs" as well as "the composition of the Court of Appeals with its current and projected caseloads." The Task Force was directed to "make recommendations ranging from the future structure and operations of the court, to staffing, technology and facility needs."

The Supreme Court named the following individuals to the Quarter-Century Task Force:

Donald L. Burnett, Jr. (Chair), Dean, University of Idaho College of Law
Hon. Roger S. Burdick, Justice, Idaho Supreme Court
Hon. Darrel R. Perry, Chief Judge, Idaho Court of Appeals
Patti Tobias, Administrative Director of the Courts
Hon. Denton Darrington, Chair, Idaho Senate Judiciary and Rules Committee
Hon. Jim Clark, Chair, Idaho House Judiciary, Rules and Administration Committee
Hon. Joel D. Horton, District Judge, Fourth Judicial District (later appointed to Supreme Court)
Hon. John P. Luster, Judge, First Judicial District
Lawrence G. Wasden, Idaho Attorney General (by Kenneth K. Jorgensen, Deputy Attorney General)
Molly Huskey, Idaho State Public Defender, Boise
John Magnuson, Attorney, Coeur d'Alene
Marcy Spilker, Attorney, Idaho Department of Health & Welfare, Lewiston
Michael E. McNichols, Attorney, Lewiston
C. Timothy Hopkins, Attorney, Idaho Falls
Katherine Moriarty, Attorney, Idaho Falls
Thomas A. Banducci, Attorney, Boise, and President, Board of Commissioners, Idaho State Bar
Dr. Kerry Hunter, Professor of Political Economy, The College of Idaho, Caldwell

The Supreme Court further designated Stephen W. Kenyon, Clerk of the Courts, to serve as Reporter for the Task Force. (The Task Force hereby commends Mr. Kenyon for his exceptional service, which has gone far beyond the ordinary tasks of a reporter.)

During the spring and summer of 2007, the Quarter-Century Task Force convened in three plenary sessions held on March 23, 2007, May 24, 2007, and August 16, 2007. Subcommittee meetings were held between the sessions to examine data and to develop recommendations concerning:

- Caseload trends and engines of growth
- Quality issues and the imperatives of appellate justice
- Timeliness of the appeals process, including the time segments in which Clerk's records and reporters' transcripts are prepared, briefs are submitted, cases are assigned or retained by the Supreme Court, and opinions are rendered
- Court personnel needs, procedures, facilities, and applications of technology
- Court administrative challenges presented by self-represented (*pro se*) litigants on appeal

At the last plenary meeting in August, the Task Force reached general conclusions that guided the drafting of this report throughout the fall. The Task Force espoused a vision that the Idaho Supreme Court and Court of Appeals together can comprise the best small-state appellate system in America. In order to fulfill that vision, the Task Force reached the following conclusions:

1. *Based on recent and projected growth in the number of appeals filed in Idaho, the Court of Appeals faces a structural gap between its caseload and its capacity.*

2. *In determining the investment required to close this gap, basic functions and process imperatives of an appellate system must be addressed. The Idaho Court of Appeals (and Supreme Court) must receive the resources needed for an appellate system that --*

    a. *Furnishes an opportunity for oral argument in every case where argument has not been waived by all parties, unless compelling reasons make oral argument impracticable or undesirable.*

    b. *Provides the judges of the Court of Appeals sufficient time to write publishable opinions in more cases, thereby maximizing the guidance given by the Court to the bench, bar, and public. (The Task Force also encourages the Court to proceed with its plan to enhance access to opinions that will continue to be unpublished in the future, by adding them to a special directory on the Court's website, effective January 1, 2008.)*

    c. *Enables the Court of Appeals to attain national distinction by becoming one of the country's first appellate courts to comply with appellate time guidelines established by the American Bar Association.*

3. *In order to secure the basic functions and process imperatives of Idaho's appellate system, the Supreme Court should –*

    a. *Seek funding for two more Court of Appeals judges, one immediately and another to follow, together with needed support staff and a physical facility that will accommodate the expanded Court while providing an opportunity for other collaborative initiatives.*

    b. *Adopt rules or suggest statutory changes as needed, and seek funding for modern technology, to achieve timely preparation of reporters' transcripts and to implement rigorous new procedures for case management and preparation of appellate records.*

    c. *Obtain resources for the Clerk's Office and Office of the Staff Attorney to provide educational assistance for, and more effective rules compliance by, self-represented (pro se) parties on appeal.*

Caseload Trends and Drivers

As noted in the introduction to this report, the Court of Appeals commenced operations in 1982 with an initial assignment of 206 appeals. Table 1 below shows that the number of appeals assigned each year to the Court of Appeals by the Supreme Court did not change remarkably during the ensuing decade. During the mid-1990s, however, the assignments moved toward an average of approximately 300 new cases per year and, starting in 2001, the assignment level increased to approximately 500 new cases annually – nearly a 250% increase over the original level.

Table 1[7]

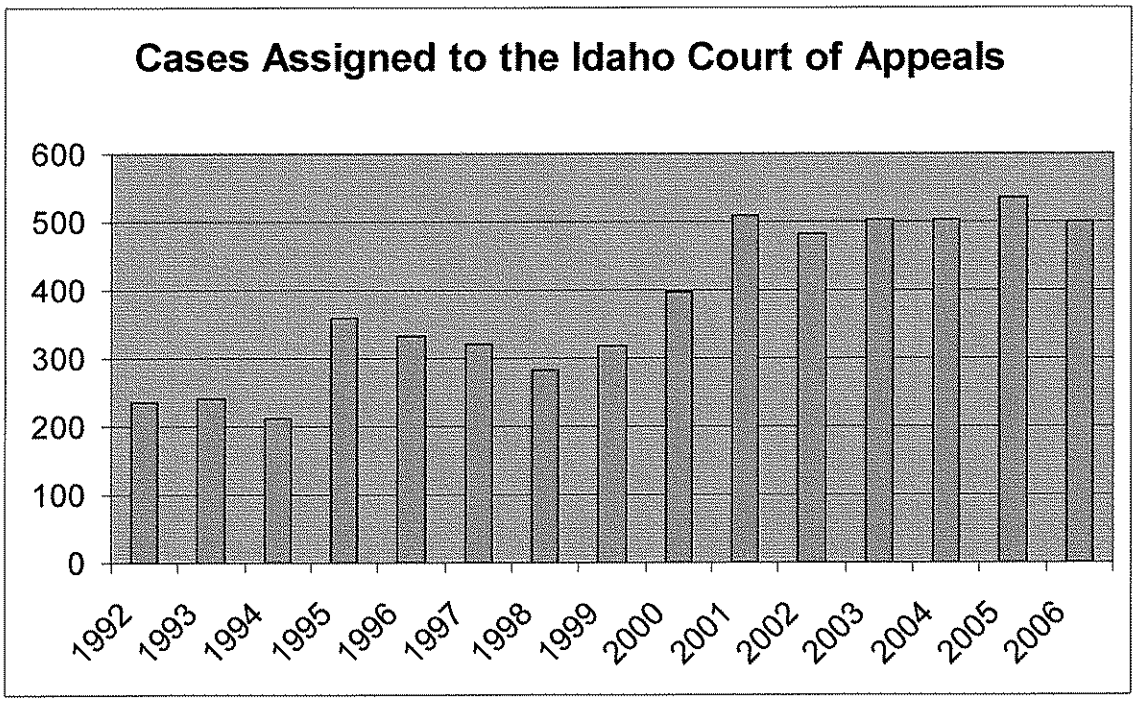
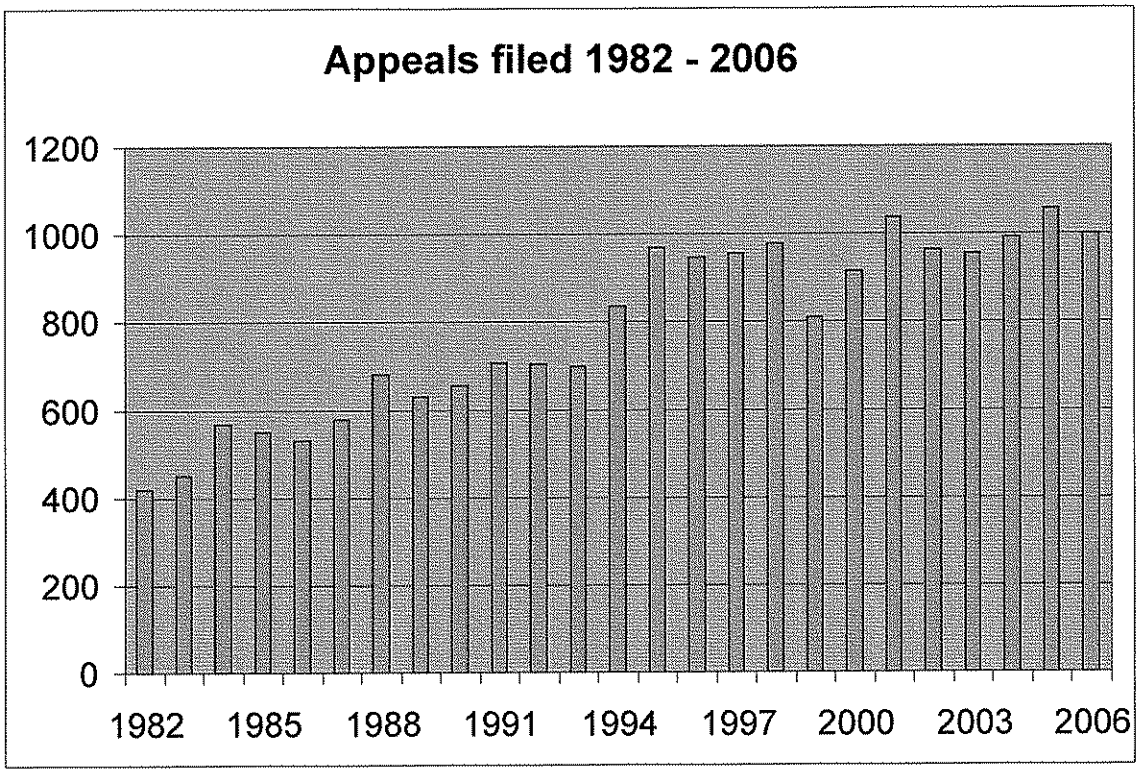


Table 2 on the next page helps explain why the number of assignments grew so rapidly after an initial period of stability. The total appeals received by the appellate system – that is, by the Supreme Court – grew from more than 400 in 1982 to more than 600 in 1992, followed by an increase in the mid-1990s that took the new appeals to a level of more than 900 per year, eventually reaching an annual figure of approximately 1000.

[7] Handout supplied by the Court of Appeals for May 23, 2007, Task Force Meeting.

Table 2 [8]



In other states, the growth in appellate filings has been more modest. Nationally, appellate filings increased by just 1% from 1995 to 2004.[9] Indeed, during calendar year 2001, 33% of the states reported a decline in new case filings at an appellate level.[10] Idaho, however, was not one of those states. Idaho's growth, while moderate, has put it among the states with the fastest growing appellate workloads.[11]

Further growth can be expected. As the population of Idaho increases, so will the number of civil and criminal cases filed in our district courts, including the magistrate divisions. When the Court of Appeals began operations in 1982 there were 30 district and 61 magistrate judges in Idaho.[12] As of the date of this report there are 42 district judges (an increase of 28%) and 87 magistrate judges (an increase of 30%). Even more remarkable has been the growth in dispositions of criminal cases in the district courts. In 1982, there were 3,637 such dispositions. By 2006 the number had grown to 14,354 – an increase of nearly 400%.[13]

The growth in criminal cases is likely correlated to the increase in Idaho's population and to the increased urbanization of that population (a significant contributor to drug-related arrests). Idaho's population in 1982 was approximately 975,000; today it is approximately 1,500,000, an increase of more than 50%. Idaho's population is expected to continue growing rapidly, as reflected in the Census Bureau data and projections depicted in Table 3 on the next page:

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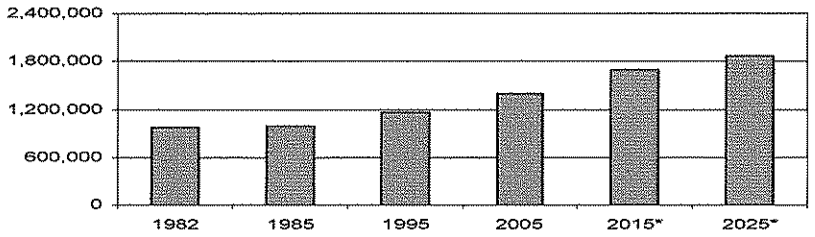
[8] Annual Report of the Idaho Courts 1982 – 2006.
[9] *Examining The Work of State Courts*, National Center for State Courts, pg. 74 (2005).
[10] *Id.*
[11] *Id.* at 75
[12] Idaho Blue Book, pg. 180-81. (1982)
[13] Annual Report of the Idaho Courts, 1982 – 2006.

Table 3
Idaho Population Growth[14]



** Estimates*

The rising population obviously will increase the future work of the courts and the number of appeals filed, although it appears that other factors may have a moderating effect. Mediation and other alternative dispute resolution options likely have slowed the rate of growth in appellate filings. It is possible (although still unclear) that drug and mental health courts also are beginning to have a moderating influence on the number of criminal appeals filed.

Another indicator of demand upon an appellate court is the ratio of population to the number of appellate court seats. Where does Idaho's Court of Appeals fall in comparison to other regional states that have a court of appeals and whose population is roughly similar to Idaho? Table 4 shows that Idaho has a very high ratio of population to the number of seats on its second appellate court.

Table 4
Western States of Similar Size With a Court of Appeals[15]

State	Court of Appeals Judges	Supreme Court Justices	July 2006 Population	Population per Court of Appeals Judge
New Mexico	10	5	1,954,599	195,460
Hawaii	6	5	1,285,498	214,250
Alaska	3	5	670,053	223,351
Nebraska	6	7	1,768,331	294,722
Utah	7	5	2,550,063	364,295
Idaho	**3**	**5**	**1,466,465**	**488,821**

Taking all of these caseload factors into consideration, the Quarter-Century Task Force has concluded that the increase in appellate filings after the Court of Appeals' first decade of operation is a permanent phenomenon. The current plateau of filings likely will be followed by another period of ascent, driven by Idaho's increasing population and the rising criminal case activity in the district courts. Most of the appeals generated by these criminal cases will be prime candidates for assignment to the Court of Appeals. The question, then, is whether an elevated caseload is creating a structural gap between the Court's caseload and its workload capacity.

[14] This table is based on U.S. Census Bureau data. The 2015 and 2025 figures are averages of high and low Census Bureau projections in those years. *See* http://www.census.gov/population/projections/state/stpjpop.txt.

[15] Montana, Wyoming and Nevada do not have an intermediate court of appeals. Population data verified with the Census Bureau on 12/05/2007, http://www.census.gov/popest/states/tables/NST-EST2006-01.csv

Caseloads and workloads are correlated, of course, but they are not exactly the same thing. The work required to dispose of appeals depends upon the time demands of various categories of cases and upon the quality standards to which an appellate system aspires. As noted earlier, the Quarter-Century Task Force aspires for Idaho's appellate system to be among the nation's best. In evaluating the work of a court with high standards, as noted by the National Center for State Courts, estimates of time demands should be "responsive, when appropriate, to the special needs of individual cases when doing so does not sacrifice the quality of appellate justice."[16]

One "easy" category of appeals consists of cases dismissed due to settlements, consolidations, jurisdictional defects, and other circumstances before an assignment decision is made. In Idaho, nearly all such dispositions occur before the appeals are "at issue" -- that is, before the record and briefing are complete, which is the point when the Supreme Court determines whether to assign or retain a case. Because every case "belongs" to the Supreme Court until it is assigned to the Court of Appeals, the Supreme Court gets "credit" for these pre-assignment dispositions. According to the Clerk's Office, the median number of cases dismissed each year in Idaho has been 165 during the past quarter-century, increasing to 229 since the year 2000 – more than 20% of the total filings.

Thus, in recent years, Idaho's appellate system typically would receive approximately 1000 new appeals per year – as shown in Table 2 above -- and of that number, about 229 would be dismissed, leaving roughly 771 to be decided on the merits. Within that number, the Court of Appeals would be assigned approximately 500 – as shown in Table 1 -- and the Supreme Court would retain about 271. At first glance, it might appear that the five-member Supreme Court is overloading the three-member Court of Appeals. It must be remembered, however, that the cases retained by the Supreme Court tend on average to be more time-consuming. Moreover, the Supreme Court has duties in addition to case adjudication. It is responsible for administering the statewide court system, for regulating the practice of law (including admission and professional discipline), for developing and reviewing rules, and for maintaining relations with the other branches of government.

The work of the Court of Appeals, in contrast, consists almost entirely of case adjudication. But the Court of Appeals has a unique time-consumption factor of its own, when compared to "intermediate courts" around the nation. Whereas the caseloads of those "intermediate courts" usually harbor appeals destined for dismissal, the Idaho Court of Appeals has almost no such cases. As just explained, dismissals in the Idaho appellate system generally occur before cases are assigned to the Court of Appeals. Consequently, the average time required for cases assigned to our Court of Appeals will exceed the average time required for cases filed in "intermediate" courts elsewhere.

There is another consideration to be borne in mind when converting caseloads to workloads. It is, as stated above, the level of quality expected of the appellate system. Accordingly, before settling on a workload formula, we turn to the topic of quality in greater detail.

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[16] Appellate Court Performance Standards and Measures, National Center for State Courts, §2.4, pg. 9, (1999).

Protecting Quality in Appellate Justice:
Basic Appellate Functions and Process Imperatives

If the performance of an appellate system could be assessed solely by speed and economy, appeals might be decided by a coin flip. But, as implied by the constitutional mandate of "right and justice," we also expect our courts to articulate -- and adhere to -- the rule of law. Therefore, in evaluating Idaho's appellate system, and in determining the resources needed for the Court of Appeals in the future, our analysis begins with an understanding of the justice-producing functions the Court must perform.

One of the vital functions of an appellate court is to review for error the decisions of trial courts and administrative tribunals. An appellate court determines whether findings of fact are supported by substantial evidence, whether discretion has been exercised by reasoned choice within legal permissible bounds, and whether the law has been accurately stated and applied to the facts found.[17] The error correction function

> [a]ssures decision-makers at the first level that their correct judgments will not be, or appear to be, the unconnected actions of isolated individuals, but will have the concerted support of the legal system; and it assures litigants that the decision in their case is not prey to the failings of whichever mortal happened to render it, but bears the institutional imprimatur and approval of the whole social order as represented by its legal system.[18]

A second vital appellate function of appellate courts is "to announce, clarify, and harmonize the rules of decision employed by the legal system in which [the judges] serve."[19] This second function recognizes that "on the one hand, appellate justice is preoccupied with the impact of decisions on particular litigants, but on the other it is concerned with the general principles which govern the affairs of persons other than those who are party to the cases decided."[20]

These basic functions imply certain "process imperatives," including assurances that the appellate judges:

- Are impartial
- Think individually but act collegially in a collective decision-making process
- Interact directly and respectfully in court with counsel or self-represented parties
- Inform themselves fully regarding the material issues and record in each case, and regarding the law on which decisions are to be based
- State clearly the grounds for their decisions

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[17] *See generally* "Standards of Appellate Review in State and Federal Courts," *Idaho Appellate Handbook* (Idaho Law Foundation, Inc., 1996). Standards for review of decisions by state administrative agencies are generally prescribed by statute and represent an adaptation of the standards for review of court decisions.

[18] Paul D. Carrington, Daniel J. Meador, & Maurice Rosenberg, *Justice on Appeal* (West Publishing Co., 1976), at p. 2 (hereafter cited as "Carrington").

[19] *Id.* at p.3

[20] *Id.*

- Make their decisions and statements of reasons accessible to the parties and throughout the legal system as well as to the public.

When caseload pressures outweigh the resources of an appellate system, the basic functions and process imperatives of appellate justice are vulnerable to compromise – even in courts with the best and most hard-working judges. As noted earlier in this report, caseload pressures have grown in Idaho while resources have remained relatively static. The Idaho Court of Appeals is showing symptoms of stress.

Oral Argument

The Court of Appeals has deemed it necessary to dispense with oral argument in some cases even when argument has not been waived by the parties. The Court's authority to do so derives from Idaho Appellate Rule 109, adopted in 1997 with subsequent amendments. (The Supreme Court reserves a similar power under Idaho Appellate Rule 37.) According to information provided by the Clerk's Office, Rule 109 was invoked by the Court of Appeals in 19 cases during 2005 and in 21 cases during 2006.[21] During the first eight months of 2007, it had been utilized in 13 cases. Although the absolute number of oral argument denials is not yet large, the existence of a rule authorizing such denials, and the regularity of its use, are signs that the Court of Appeals is feeling a caseload-based pressure to abridge the appellate tradition of oral argument.

In 1980 the Idaho State Bar's "Committee to Find Solutions to Appellate Caseload Problems" considered and rejected abridgement of oral argument as a response to the caseload crisis at that time. As the Committee noted, "[o]ral argument is the only opportunity for dialogue between the court and representatives of the parties whose interests are at stake. It is the only chance for direct exchange of views and clarification of positions on issues."[22]

Moreover, oral argument provides visible assurances that every judge is personally engaged in considering the issues and deciding the case (an assurance that is important to the public as well as to parties who did not waive argument), that "in fact and in appearance ... decisions are made collectively," and that "the judges themselves [rather than staff or law clerks] are making the decisions."[23] For these reasons, curtailment of oral argument in the federal appellate system has been criticized as "run[ning] against the American appellate tradition," even though it is reluctantly tolerated as a defensive self-help measure adopted by the courts in the face of caseloads exceeding the resources available.[24]

Recommendation No. 1

The Task Force recommends that the Idaho Court of Appeals (and Supreme Court) receive resources sufficient to enable the courts to furnish opportunity for oral argument in every case where argument has not been waived by all parties, unless compelling circumstances make oral argument impracticable or undesirable.

[21] Exhibit provided by the Court of Appeals for the May 23, 2007, Task Force meeting.

[22] Bar Committee Report, *supra* note 3, pp. 12-13.

[23] Carrington, *supra* note 8, at 17.

[24] *See, e.g.*, Thomas E. Baker, *Intramural Reforms: How the U.S. Courts of Appeals Have Helped Themselves*, 22 Florida State University Law Review 913, 916 *et seq.* (1995).

Accessible Written Opinions

The Task Force notes with approval that neither the Idaho Court of Appeals nor the Supreme Court, despite caseload pressures, has embraced a practice -- found in some other state or federal courts -- of declining to write opinions that explain their decisions in certain categories of cases.[25] The explanatory opinion is a cornerstone of the American appellate process. It promotes "right and justice" in fundamental ways:

> First, litigants and the public are assured the decision is the product of reasoned judgment and thoughtful evaluation rather than the mere exercise of whim and caprice. Second, the very writing of an opinion reinforces decision-making and ensures correctness. Third, appellate opinions are the life stream of the common law, for they create precedents....
>
> In the balance of interests involved, the value of self-restraint provided by writing deserves greater weight than the value of efficiency gained through decision-making by edict.[26]

An explanatory opinion need not be lengthy. In most cases, it is sufficient that the opinion articulate the basis of the court's decision "by a citation of the authority or statement of the grounds upon which [the decision] is based."[27] Neither must every opinion be "signed" by an authoring judge; rather, a concise opinion on a relatively simple issue or set of issues may be issued *per curiam* (that is, by the judges, collectively, of the full court or of an appellate panel). In Idaho, the use of *per curiam* opinions was encouraged by the Bar Committee in 1982.[28]

Appellate opinions, whether "signed" or *per curiam*, are matters of public record; but they cannot fulfill each of the purposes described above unless they are published or otherwise made widely accessible. During the 1980s, the Court of Appeals published almost all of its opinions. More recently, however, the Task Force understands that opinions have been divided into "published" and "unpublished" categories under an internal rule, with the "unpublished" category representing the overwhelming majority of opinions issued by the Court. An opinion is relegated to the "unpublished" category if all the judges on the case agree that it does not amplify or clarify the law, and that there is no other reason to "publish" it. According to the Clerk's Office, the Court of Appeals in 2006 produced 549 dispositive opinions; of this number, only 85 (15%) were "published" and 464 (85%) were "unpublished."

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[25] *See, e.g.,* Stephen Krosschell, *DCAs, PCAs, and Government in the Darkness,* 1 Florida Coastal Law Review 13 (1999) (criticizing decisions issued without opinion in Florida intermediate appellate courts, and making the provocative argument that in such cases the court's internal conferences and memoranda should be made public).

[26] *Id.* at pp. 925-26 (quoting in part from Charles M. Merrill, *Could Judges Deliver More Justice If they Wrote Fewer Opinions?* 64 Judicature 435 [1981]).

[27] 3 American Bar Association Judicial Administration Division, *Standards of Judicial Administration: Standards Relating to Appellate Courts* § 3.36(b) (1994).

[28] Bar Committee Report, *supra* note 3, at p. 8.

Criminal sentence review cases often lead to unpublished opinions, but other categories of cases receive unpublished opinions as well. Of the 243 *non*-sentence review cases in 2006, 158 (65%) were unpublished and 85 (35%) were published. Of the 158 unpublished opinions most were in civil proceedings arising out of criminal prosecutions or convictions, such as applications for post conviction relief and *pro se* habeas corpus actions filed by persons in custodial institutions. Such cases may raise a mix of criminal, civil, and constitutional issues.

"Unpublished" opinions are sent to the parties or their counsel, and to the directly affected courts or administrative tribunals, but they are not presently displayed on the Court of Appeals website or widely disseminated to the bench, bar, or public in the same manner as "published" opinions. They are deemed to have no precedential value and are presumed to be non-citable, although it is unclear whether any consequence attaches to a party or attorney who mentions such an opinion in a brief or oral argument. Under current practice, the "unpublished" opinions are available for physical inspection on a clipboard at the Clerk's Office. The Quarter-Century Task Force is informed that the Court of Appeals plans on posting the "unpublished" opinions to a special directory on the Court's website, effective January 1, 2008, a step that would not give them all the attributes of "published" opinions but would improve their accessibility.

The Idaho Court of Appeals is not alone in having some form of "unpublished" opinion rule or practice. Many state and federal appellate courts have analogous practices. At one time, "unpublished" opinions may have been justified in part by savings of paper, printing expense, binding and mailing; but those savings are minimal in the digital age when most legal research is electronic. The main rationale today appears to be that "unpublished" opinions need not be written to inform -- and to be scrutinized by -- a wide audience, and therefore can be produced more rapidly than "published" opinions.

"Unpublished" opinions have attracted criticism in national literature, for example, from advocates of general transparency in government as well as from attorneys, judges, and scholars (a) who are uneasy about the way in which "publish" or "do not publish" determinations are made, (b) who question the degree to which such cases receive the full, collective attention of all the judges, (c) who regard "unpublished" opinions as traps for unwary counsel and parties, (d) who are concerned that incomplete guidance to the bench, bar, and public on patterns of appellate outcomes could contribute in some measure to the filing of appeals, and (e) who believe opinions have significant guidance value even if they reaffirm a legal rule or principle, or show its continued application to varying fact patterns, as opposed to amplifying or clarifying the law.[29] A steady stream of consistent appellate court opinions is an important demonstration of the rule of law. It is also a predictive tool that can be used by lawyers to settle cases and by trial courts and administrative tribunals to minimize reversible error in cases that are not settled.

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[29] *E.g,* Penelope Pether, *Sorcerers, Not Apprentices: How Judicial Clerks and Staff Attorneys Impoverish U.S. Law,* 39 Arizona State Law Journal 1 (2007); *cf.* Andrew Solomon, *Making Unpublished Opinions Precedential; A Recipe for Ethical Problems and Legal Malpractice,* __ Mississippi College of Law Review __ (forthcoming, 2007) (arguing that uneven access to "unpublished" opinions militates against according them any precedential value).

The full scope of the "unpublished" opinion debate is beyond the scope of this report. The point here, however, is that our Court of Appeals has found it necessary to rely heavily upon this controversial device – with its attendant impact on basic appellate functions and process imperatives – in order, with existing resources, to stay abreast of the caseload.

Recommendation No. 2

The Task Force recommends that the Court of Appeals receive resources sufficient to provide the judges time to write publishable opinions in more cases, thereby maximizing the guidance given to the bench, bar, and public. The Task Force also encourages the Court to proceed with its preliminary plan to enhance access to opinions that may continue to be "unpublished" in the future, by adding them to a special directory on the Court's website.

Quantifying Productivity: The Wisdom of "100"

Bearing in mind the high standards of quality to which our appellate system should aspire, and considering the unique nature of the Idaho Court of Appeals' caseload – consisting almost entirely of cases to be decided on the merits by written opinion – what is the optimal but realistic workload per judge? As noted above, the Court of Appeals in 2006 produced 549 dispositive opinions (183 per court member, with contributions by judges sitting *pro tem*). This production level – more than two dispositive opinions per day -- could not have been achieved without heavy reliance upon "unpublished" opinions.

The Quarter-Century Task Force commends the judges on their efforts. In the opinion of the Task Force, however, this level of production is not sustainable without unduly impairing the functions and process imperatives of appellate justice. As shown in Table 5 below, the level is one that exceeds even the productivity commonly associated with "intermediate" appellate courts whose caseloads include appeals that eventually will be dismissed.

Table 5
Dispositions by Judge in Western States with Intermediate Appellate Courts[30]

State	Cases Disposed	Total Cases Disposed per Justice / Judge
Utah (2006)		
Supreme Court (5)	616	123
Court of Appeals (7)	1035	147
New Mexico (2004)		
Supreme Court(5)	628	125
Court of Appeals (10)	884	88
Nebraska (2005)		
Supreme Court (7)	257	36
Court of Appeals (6)	1330	221
Hawaii (2004)		
Supreme Court (5)	952	190
Court of Appeals (6)	232	38.6
Alaska (2004)		
Supreme Court (5)	395	79
Court of Appeals (3)	285	95
Idaho (2004)[31]		
Supreme Court (5)	**745**	**149**
Court of Appeals (3)	**552**	**184**

[30] Source: Report to the 74th Regular Session of the Nevada State Legislature, 2007, Senate Bill 234, p. 17 (hereinafter cited as the "Nevada Report").

[31] The number of dispositions per Supreme Court justice in Idaho was incorrectly stated in the original Nevada report. The corrected figure is shown. (In the original table the number for dispositions per judge was divided by 7, not 3.)

The Idaho figures in Table 5 invite further comment. The Supreme Court's figure of 149 cases per justice indicates hard work by that Court, but it also reflects the inclusion of dismissed cases within the Court's caseload, as previously explained. Similarly, the Hawai'i Supreme Court's figure of 149 cases per justice reflects a unitary filing system in which dismissed cases come from the Supreme Court's docket. The most important fact depicted by the table is that the Idaho Court of Appeals has the highest ratio of cases per judge of all the "second" appellate courts shown, even though its adjudication-on-the-merits caseload is likely one of the most demanding in terms of time commitment per case.

A recent effort to develop an appropriate workload for a second appellate court was recently undertaken by a commission studying the possible creation of a Court of Appeals for the State of Nevada. The "optimum relative workload" for appellate courts was described by the Commission in the following way:

> The relative workload of a court may be determined by taking the total number of cases decided by the court and dividing that number by the number of justices sitting on the court. The resulting number may be compared with the number of cases that experts consider to be the optimum for an appellate judge to decide in a year. Taking into account the other duties of a judge [citation omitted], experts suggest that an appellate court with the "usual mix" of cases, like the Nevada Supreme Court, should be required to dispose of no more than 100 cases per judge per year....[32]

The Colorado Court of Appeals also has concluded recently that 100 dispositions per judge is the optimum appellate workload:

> Based on historical data and current levels of staff attorney support, each judge on the Court of Appeals is expected to issue between 90 and 100 opinions each year. In addition, each judge must actively participate (i.e., read the briefs, review cited authorities and records where appropriate, hear oral argument when it has been requested, provide input for the opinion, and write separately if necessary) in deciding an additional 180 to 200 cases annually. Every judge also reviews and comments on opinions from other divisions that are proposed for publication; rotates through a three-judge motions division that meets weekly to rule on motions filed in connection with pending appeals; and participates in weekly division conferences and bi-weekly full court conferences.[33]

The baseline of 100 appellate cases per judge seems to have originated in the landmark study of appellate courts by Paul D. Carrington, et al., whose book, *Justice on Appeal*, is quoted and cited elsewhere in this report. Carrington and his colleagues make this cautionary observation about appellate court workloads:

> [T]here is a finite limit to the number of decisions which any judge or panel can make without jeopardizing the essential qualities of the process. Difficult though it be to define the limit, we have concluded that it should be this: if the mix of cases is not more nor less difficult than the usual mix for state intermediate courts where first appeals of a right are heard, the limit is about 300 *plenary* dispositions per year for any one judge, or about 100

[32] Nevada Report, *supra* n. 29, at pg. 14.

[33] Colorado Court of Appeals Budget Request, Program Request, pg. III-54 (2004).

> dispositions *per judgeship* if we assume that judges sit in panels of three [emphasis supplied] ....[34] [I]t is possible that some courts may be able to decide more than 100 cases per judgeship per year consistently with the imperatives of appellate justice. But it is unlikely .... A legislative body which has allowed its appellate courts to accumulate a heavier load than 100 dispositions per judge per year, without such a showing of unusual circumstance, is neglecting its responsibility for appellate justice and for the general quality of government. [35]

Concededly, not all states agree with this analysis. Some states with large populations have used a case-weighted analysis to establish an optimal level of dispositions per judge.[36] According to Florida Court Rule 2.035, for example, a request for funding of a new appellate judge may occur when the weighted caseload reaches 350 filings per judge. In addition, the Florida Commission reviews each appellate court (there are five district courts of appeal) every four years to determine optimum workload levels by measuring the courts' workload, efficiency, effectiveness and professionalism in determining the need for increasing or decreasing the number of judges.[37] In the view of the Quarter-Century Task Force, however, this approach takes inadequate account of quality criteria for appellate courts. Indeed, the Florida appellate courts have been criticized for deciding cases without opinion – a practice even more at odds with the appellate function and process imperatives than the use of "unpublished" opinions.[38]

Many federal appellate courts are operating at a level of 500 cases per three-member panel. A General Accounting Office study has suggested that this should be the standard for determining the need for additional judges in any of the circuits, although the study has been criticized as drawing this figure more from existing caseloads than from a conceptual analysis of what the caseload should be.[39] The federal appellate courts, in any event, are true "intermediate" courts with many filings that ultimately result in dismissals. Moreover, these courts are augmented by senior judges who, under the federal system, typically handle substantial caseloads, have their own offices, and are assisted by their own law clerks and secretarial staff. They represent a larger production asset to the federal appellate courts than do the senior judges who participate ad hoc, without offices, staff, or law clerks, in the Idaho appellate system. Even with these advantages taken into account, the figure of 500 cases per three-member federal appellate panel may be too high from a quality perspective. As noted by one federal chief judge, "the sheer volume [of cases] has had an adverse impact on the number of decisions that we can fairly claim to have been fully considered and understood."[40]

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[34] Carrington, *supra* note 13, at p. 143.

[35] *Id.* at p. 146.

[36] Report of Florida Commission on District Court of Appeal Performance & Accountability dated September 30, 2005.

[37] *Id.*

[38] *See* Krosschell, *supra* note 26.

[39] *See generally,* Arthur D. Hellman, *Assessing Judgeship Needs in the Federal Courts of Appeals: Policy Choices and Process Concerns,* 5 Journal of Appellate Practice and Process 239 (2003).

[40] Chief Judge Carolyn Dineen King, U. S. Court of Appeals for the 5th Circuit, speech converted to law review article in King, *A Matter of Conscience,* 28 Houston Law Review 955, 958 (1991).

Having weighed all of these diverse approaches, the Quarter-Century Task Force has concluded, as a general matter, that the received wisdom about a productivity level of 100 cases per judge per year remains sound, is well correlated to the type of cases our Court of Appeals handles, and is consistent with the high standard of quality that should be expected of Idaho's appellate system. At the same time, the Task Force recognizes that our Court of Appeals handles a substantial number of criminal sentence reviews (306 such cases in 2006, as noted above) that usually are not as time-consuming as appeals in most other categories of cases. Therefore, the Court in a given year may be capable of accommodating a caseload surge requiring more than 100 decisions by opinion per judge, but 100 should be regarded as the long-term, sustainable baseline of productivity.

Recommendation No. 3

The Task Force recommends that the Supreme Court adopt a quantitative guideline for determining the number of judges needed on the Court of Appeals. The Task Force further recommends that 100 cases per judge per year be the baseline of productivity, with flexibility for increases ranging up to 120 cases per year per judge. When such increases establish a new norm, however, legislative support for another judge should be sought without delay in order to restore the baseline of 100 cases per court member. In the present circumstance, this means that the three-member Court of Appeals, which for several years has received assignments of approximately 500 cases annually, has a demonstrated need for two additional judges – one immediately, and the other as soon as possible.

Court of Appeals Personnel

Because the Court of Appeals needs two additional judges – one immediately, with the other soon to follow – in order to bring its capacity into line with the current caseload, the total personnel implications of this expansion must be considered. The Task Force reviewed the personnel costs associated with *each* additional judge to be added to the Court of Appeals:

	Salary	Benefits		Total Annual Cost
Court of Appeals Judge	$116,185	28,003		$144,188
Judicial Assistant	49,177	19,471		68,648
Law Clerk	49,135	19,447		68,582
Law Clerk	$49,135	19,447		68,582
Total[41]				$350,000

[41] This total reflects a salary for law clerks that are in their second year of service, and it conservatively assumes a 1% increase over salary levels in FY 2008. In addition, there are costs of approximately $10,000 for travel to hearings and for job-related education.

Court of Appeals Facilities

The Court of Appeals rents approximately 4500 square feet of office space in downtown Boise. The space was leased "temporarily" in 1982 until state-owned facilities would become available. Although the Court has a security system on the doors and an interior alarm system, security has been a perennial maintenance issue. Currently, the system is jointly maintained and monitored by a private alarm company and by the Boise Police and Fire Departments.

With 4500 square feet, there is barely adequate space to accommodate the three judges of the Court of Appeals, each with a judicial assistant and two law clerks. Senior judges serving *pro tem* are provided "office" space at a spare desk in the storage room, where they are surrounded by the Court's supplies, file cabinets, recycle bins, document shredding equipment, and the security monitoring and first aid equipment. Because the judges *pro tem* have no independent staff—neither an assistant nor a law clerk— they must rely on the staff of the sitting members of the Court for any support.

For each new member of an expanded Court, an office will be required for the judge and a separate space large enough for a staff assistant and two law clerks. As noted, the Court has merged its supply room with its *pro tem* "office" – an arrangement that provides no expansion space and is, in any event, less than ideal. All law clerks work in a single, large room with dividers that do not prevent noise distractions. It appears that a minimum of 1500 additional square feet, in an appropriate layout of offices, would be necessary for the Court's operations with the addition of a fourth judge, and that another 1500 square feet would be needed for the fifth judge. In addition to these square footage requirements, the planning of a new location for the Court must take into consideration the Court's specific needs and preferences for the layout and allocation of space. The Court must have space to store supplies, all of the Court's files, fireproof file cabinets, copier, FAX, and audio-video equipment; and countertop work space would be needed. A conference room that could accommodate twenty people at one time would be necessary. A kitchen area, a working library and restrooms are also in the current layout; they need to be included in the Court's future office space. The location must also consider improved space for senior judges, as well as space and for an assistant and law clerk to support them.

In short, a move from the Court's current location will be necessary to accommodate any increase in personnel. The permanent location for the Court over the next twenty-five years and beyond will need to take into account the foreseen expansion of the Court to five (and ultimately more) members without requiring yet another move. A plan to relocate the Court of Appeals must be undertaken immediately. A location in or near the Supreme Court Building will be necessary in order to provide acceptable access to the Clerk's Office and to the courtroom shared with the Supreme Court, and to accommodate the movements of files when cases are assigned to, and eventually decided by, the Court of Appeals.

Recommendation No. 4

The Task Force recommends that the Supreme Court undertake now to develop facilities solutions that will serve the immediate and long-term expansion needs of the Court of Appeals.

Idaho Law Learning Center

An especially efficient space arrangement would be one that places the expanded Court of Appeals in the same building with the Supreme Court, where the Clerk's Office and shared courtroom are located. As the Quarter-Century Task Force reviewed all the options available for the Court of Appeals (including tours of the old Ada County Courthouse and the Borah Building) then-Chief Justice Gerald Schroeder advanced the idea of an "Idaho Law Learning Center" to be built east of the Supreme Court and to be operated in collaboration with the University of Idaho College of Law. At its August plenary meeting, the Task Force received an oral report regarding the intentions of the Supreme Court, acting through current Chief Justice Daniel Eismann, to request permanent building fund money to plan such a new building. The facility would house the State Law Library, relocated from the Supreme Court Building (thereby making room for the Court of Appeals), along with several large, flexible, multi-function/meeting rooms, and space for University of Idaho law programs. The facility would support the instructional functions of the Idaho Supreme Court, the local legal community, and the Idaho State Library, and other state agencies, as well as the University of Idaho College of Law. It would serve as a center of civic education on the rule of law in a democratic society. The presently estimated cost of this project is $29,758,620.

Recommendation No. 5

The Task Force recommends that the Supreme Court and the Court of Appeals pursue opportunities for efficient space utilization and collaboration as illustrated by the Idaho Law Learning Center proposal.

Preventing the Re-Emergence of Appellate Delay: Time Standards for All Stages of an Appeal

Idaho can be proud of the fact that its Supreme Court was the first in the nation to adopt time standards for the appellate process. By order dated May 14, 1986, the Supreme Court declared that in all cases, the full duration of an appeal should not exceed 418-508 days, depending on the geographical location in the state where the appeal was filed.[42] This guideline included a call for cases to be at-issue within 175 days.[43] The Supreme Court's timelines have been adjusted over the years but remain close to the original declaration in 1986.

In 1994 the American Bar Association adopted its own time recommendations, known as "reference standards," couching them in terms of percentages of cases that should comply rather than trying to bend the timeframes to accommodate outlying cases. These reference standards provide that 50% of all cases decided by a court of last resort, and 75% of all cases decided by an "intermediate" appellate court, should be resolved within 290 days from filing of the notice of appeal. In addition, 90% of all cases decided by a court of last resort, and 95% of cases decided by an "intermediate" court, should be resolved within 365 days.[44]

Lifecycle and Lifespan of an Idaho Appeal

How does Idaho's actual appellate process measure against these standards? The answer lies in an examination of the lifecycle of an Idaho appeal. As of December 31, 2006, the average lifespan of an Idaho appeal was 539 days in the Supreme Court and 400 days in the Court of Appeals.

The time required to move an Idaho appeal from the moment of filing to the issuance of the decision has fluctuated over the decades. During the mid-1970s (due to the dramatic rise in caseload) the time taken from filing to opinion substantially increased. As noted at the outset of this report, the average length of additional time for a case to reach a decision peaked in 1982 (the year the Court of Appeals began operations), with an average case taking 838 days in total from notice of appeal to decision.[45] Today, as shown by the figures above, the performance of the system is much better; nonetheless, as explained below, there remains room for much improvement.

Many parts of an appellate lifecycle contribute to an appeal's lifespan. The appellate process begins when a party files a notice of appeal within 42 days of a final order in the district court. Once the notice of appeal has been filed the district court (or administrative agency) begins the process of preparing a copy of key documents in the district court file (known as the record) and court reporters begin preparing transcripts of hearings if

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[42] Idaho Supreme Court Press Release dated May 14, 1986.

[43] *Id.*

[44] Judicial Administration Division, American Bar Association, *Standards Relating to Appellate Courts* § 3.52.

[45] The Idaho Courts Annual Report pg. 3 (1982).

requested by the parties. This process is referred to as the record and transcript phase of an appeal.

The Idaho Supreme Court's current timelines for the record and transcript phase are shown below:

- Once a notice of appeal is filed and if a transcript is requested, the court reporter has 63 days to compile and file a transcript with the district court of the hearings requested.

- *Concurrently,* the Clerk of the Court has 42 days to lodge the record if a transcript is requested or 21 days if no transcript is requested. Once the record is completed the Clerk of the Court provides a copy to all parties of the proposed district court record. The parties to the appeal then have 28 days to review and comment on the proposed record.

- Once the 28 days run the Clerk of the District Court files the final record with the Clerk of the Supreme Court. The Clerk of the District Court is given 7 days for mailing.

- The foregoing combined process should be complete within 98 days.

When the records and transcripts are received by the Supreme Court, the appeal enters the briefing stage. This stage should take 84 days to complete;

- Appellant's brief is due 35 days from the date the record is filed with the Supreme Court.

- Respondent's brief due 28 days from the date the appellant's brief is filed with the Supreme Court.

- Appellant's reply brief due 21 days from the date the respondent's brief is filed with the Supreme Court.

At this point the case is "at-issue," meaning the case is ready to be reviewed by the Supreme Court and either retained at the Supreme Court or assigned to the Court of Appeals.

In total this process should take 182 days; in fact, however, the process is taking more time. As shown by Table 6 on the following page, approximately 283 days were required, on average, to get a case "at-issue" in 2006.

Table 6
Court of Appeals
Average Age of Cases in Days

2006	Notice of Appeal To Assignment "at-issue"	Assignment To Opinion	Notice of Appeal To Opinion
Sentence Review	277	45	322
Civil	339	171	510
Criminal & Post Conviction (excluding sentence reviews)	284	170	454
Other Cases (excluding sentence reviews)	231	188	419
Average	283	143	426

Thus, cases assigned to the Court of Appeals generally are reaching disposition within the aggregate time range established by the Supreme Court, but they are not in compliance with the ABA reference standards. In calendar year 2006, for example, the Court of Appeals resolved 29% of its cases within 290 days from the notice of appeal, and 49% of its cases within 365 days of the notice of appeal.

The problem is an ironic one for the Court of Appeals, because that Court does not control the appellate process until a case reaches the "at issue" stage and is assigned (or retained) by the Supreme Court. It is currently taking the average case almost as long (283 days) to reach "at-issue" status as the total time (290 days) the ABA says should be consumed by the entire appellate process. Once the Court of Appeals receives an assigned case, it decides the case fairly expeditiously (143 days). This is a tribute to the judges' hard work, although it also reflects the compromises of basic appellate functions and process imperatives discussed earlier in this report.

Idaho has an opportunity to attain national prominence if it becomes the first state, or among the first states, to attain compliance with the ABA reference standards while emphasizing quality in the appellate decision-making process. Needless to say, Idahoans would be well served by such an achievement. The Court of Appeals could attain such time standard compliance if judges were added to the Court as recommended above, enabling the Court to couple high efficiency with fulfillment of the appellate functions and process imperatives, *and* if the early time segments of the appellate process – before cases reach the Court of Appeals – could be shortened.

Recommendation No. 6

The Task Force recommends that the Supreme Court adopt the ABA reference standards for the full duration of an appeal. As applied to the Court of Appeals, this would mean 75% of assigned cases decided within 290 days from the filing of the notice of appeal, and 95% within 365 days. These time periods would include a 185-day early time segment standard for getting an appeal from filing to the "at issue" stage. This early time segment standard, if enforced, would give the Court of Appeals a chance to satisfy the ABA standards for the aggregate lifecycle of cases assigned to it. Enforcement will require close attention by the Supreme Court and the Clerk's Office to every component of the early segment.

Improving the Appellate System's Performance in Early Time Segments

The Quarter-Century Task Force devoted much discussion to the time required to get cases 'at-issue' and ready for assignment. Two particular sub-issues attracted the greatest attention: the time required for preparing the reporters' transcripts, and the number of briefing extensions requested by the parties.

Reporters' Transcripts. In reviewing the early time segment issues the Task Force identified the delay in the preparation of transcripts as a critical factor in the overall appellate picture. (Preparing clerks' records is largely a scanning or copying activity, but reporters' transcripts involve the creation of new, complex documents.) The Task Force discussion focused on the current backlog of appellate transcripts and their impact on the ability of the courts to judiciously process appeals. There are two critical factors: first, the impact of the timeliness of transcripts in the overall appellate process, and second, the increasing workloads being placed on the court reporters across the state. The Task Force learned that there were several transcripts which were more than a year overdue to the Supreme Court which could cause an individual to be incarcerated for over a year before the first brief in their case is filed.

The Task Force asked for a survey of western states (within the federal Ninth Circuit), to determine what those states were doing to resolve the balancing act of increasing court reporter workloads while also assuring production of timely work products. After assembling the data and reviewing the western states study, Supreme Court/Court of Appeals Clerk Steve Kenyon made the following recommendation to the Task Force at its final plenary meeting in August:

1. Cut the time for the production of transcripts from 63 days to an average of 45 days (the average in states of the Ninth Circuit).

2. Provide a tiered approach to the filing of transcripts. It makes little sense to give a court reporter the same preparation time for a 20-page transcript as for a 2,000-page transcript. The Supreme Court plans to seek the input and recommendations from a Court Reporters' Committee, reflecting court reporters across the state, on developing a tiered timetable for transcripts. For occasional cases where the transcript is several thousand pages long the Court will set a transcript date after consulting with the court reporter and district judge involved.

3. Provide a presumptive maximum number of extensions a court reporter can request. Currently, the court reporters are allowed to file as many requests for extensions as they want. Several states limit the number of extensions from court reporters to between three and five per year.

The Task Force concurs with these suggestions, recognizing that balancing these two issues (court reporters' workloads vs. need for timely justice) will be difficult and will require a clear and consistent commitment from all parties involved.

Recommendation No. 7

The Task Force recommends the adoption of a tiered approach for filing appellate transcripts with the Supreme Court, taking into account the recommendations of the Court Reporters' Committee. The Court should adopt rule changes or suggest statutory changes, as needed, and should develop a strategy for strengthening court reporters' skills and reporting technology that will modernize this segment of the appellate process.

Briefs and Briefing Extensions. The second early time segment issue addressed by the Task Force was the number of extensions of time attorneys request in order to file their appellate briefs. The Task Force learned that the average case had 2.1 orders granting motions for extensions of time to file briefing; such extensions could prolong the duration of an average case by as much as 75 days.

There are contrasting schools of thought regarding extensions of time: (i) that many attorneys expect extensions in spite of the appellate rule that states that extensions are not favored, and (ii) that some cases present issues to which a lawyer, exercising professional responsibility, must devote more than the usual time for briefing – and the system should recognize that reality. Both of these viewpoints may be true, but in cases where the first viewpoint accurately characterizes the situation, there is a cultural problem to be addressed with positive leadership in judicial administration. It appears to the Task Force that the Clerk's Office is prepared to enforce a "no extension without good cause" policy, if the Supreme Court so directs. The Task Force favors such a policy, recognizing that some cases legitimately demand more time, and recognizing further that two of the major institutional participants in the appellate system -- the Office of the Attorney General and the Office of the Statewide Appellate Public Defender -- have limited resources and cannot unilaterally control their workloads. Any determination of "good cause" for a requested extension of time should include consideration of the unique constraints facing these offices, if an appropriate showing is made in support of the request.[46]

Recommendation No. 8

The Task Force recommends that the Supreme Court adopt, and direct the Clerk's Office to enforce, a policy of allowing extensions of time for briefing, under the appellate rules, only when good cause is shown.

[46] Although it is beyond the scope of this report to address the operations and funding of the Office of the Attorney General and the Office of the Statewide Appellate Public Defender, the Task Force notes that these major institutional participants in the appellate process have resource needs that may be affected by implementation of the recommendations in this report.

Another early time segment issue arises when an amended Notice of Appeal is filed. If the Notice of Appeal is amended, it creates additional burdens for court reporters, who must then go back and create additional transcripts; for the clerks, who must include additional items in the already-created record; and, in criminal appeals, for the Office of the State Appellate Public Defender (SAPD), whose staff must draft an amended Notice of Appeal without knowing what the issues were in the case, thereby delaying the movement of the case through the appellate court system.

One method by which this problem could be addressed would be to require the SAPD to provide training for public defender offices on a variety of issues, starting first with the amended Notice of Appeal issue. Attendance at training sessions could be compelled, either through a statutory change or bar certification, or invited, for example, with the motivation of free CLE credits, but regardless of the method, all public defenders should attend such training on an annual basis.

Challenges Posed by Self-Represented Litigants

One salient impact on appellate workloads is the increasing numbers of pro se parties. Pro se litigants present a unique concern in the appellate process. As a general principle, such litigants are to be treated no differently than an attorney presenting his or her client. That is to say, the pro se litigant is presumed to know the laws and rules applicable to the case on appeal. The reality, however, is that pro se litigants usually lack the knowledge, experience and skills to operate effectively in the legal arena. These circumstances can produce delays in the processing of pro se appeals, and such delays potentially can impair both the quality and timeliness of justice.

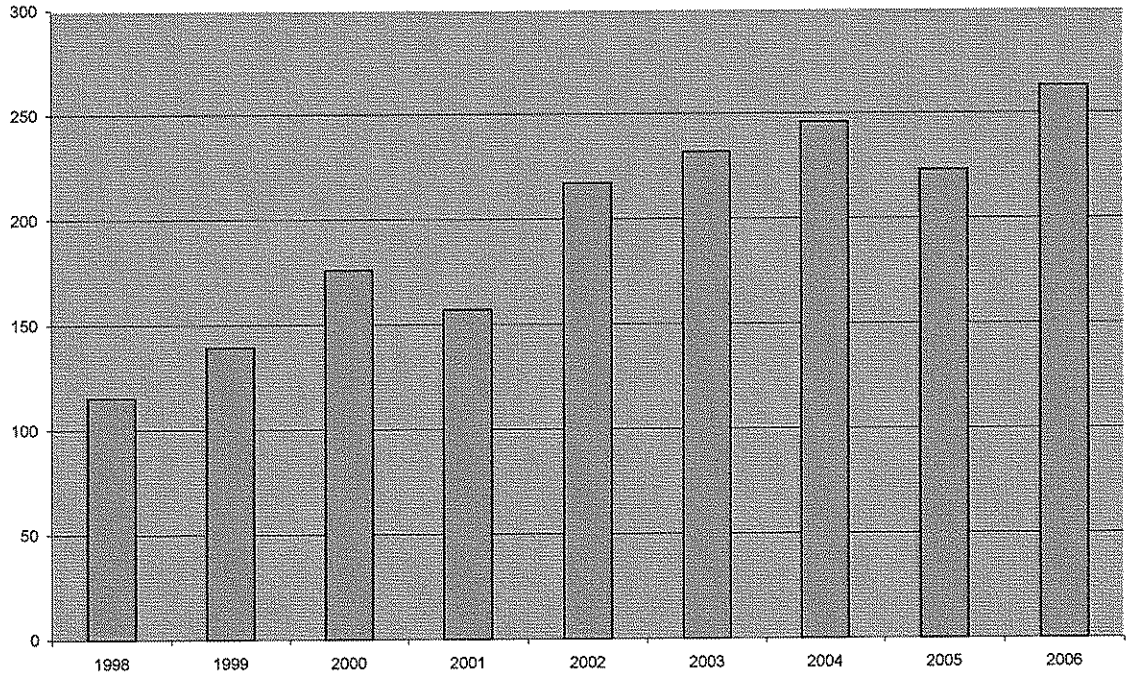
Consequently, in determining the resources needed for an effective appellate system, there must be recognition paid to the increased workload on court staff handling appeals by parties who do not understand appellate rules and procedure. It is estimated by the Clerk's Office that the average pro se appeal can take two to three times as many person-hours to process than the time consumed by the average appeal involving parties represented by attorneys familiar with appellate practice and procedure.

In 2006 pro se appeals occurred in the following categories of cases: 27% were civil and post conviction proceedings, 27% were bar admissions (with attorneys representing themselves), 13% involved writs of mandamus or original actions, 10% were bar disciplinary matters, the remaining 23% were habeas corpus actions or other criminal matters. In these cases (with the arguable exception of the bar disciplinary matters), self-representation puts additional burdens on the Clerk's Office and on the Supreme Court and Court of Appeals in determining the proper scope of the record, separating the issues that have or have not been properly raised and preserved on appeal, and deciding the appropriate issues upon briefs that may not conform to procedural requirements or illuminate substantive points of law.

The right to represent oneself in court is well established, even if it places these burdens on the administration of justice. In order to minimize the burdens, the appellate courts should develop educational tools and a service delivery system that takes into consideration the needs presented by pro se litigants. This would be consistent with efforts already in place to provide similar assistance to pro se litigants in the magistrate division of the district courts via Court Assistance Offices and their personnel.

The overall effect of such improvements would reduce delays and insure that justice is not denied to the increasing number of pro se litigants appearing before Idaho's appellate courts. As shown in Table 7 on the next page, these improvements will become increasingly necessary as pro se cases comprise a growing component of the appellate caseload.

Table 7
Number of Matters Involving Self-Represented Litigants
Processed by the Idaho Supreme Court and Court of Appeals
1998-2006[47]



Recommendation No. 9

The Task Force recommends that the Supreme Court adopt a guide to self-representation in the appellate courts, similar to the educational materials created by other appellate courts. (See also Recommendation No. 10.)

[47] Handout prepared by the Clerk of the Courts for the August 23, 2007, meeting. These cases include original proceedings and bar matters; they are not limited to appeals that could be assigned to the Court of Appeals.

Staff Support

This report has noted the additional personnel needed within the Court of Appeals. The Task Force also discussed the fact that as appellate filings increase, the "front end" staffing of the process in the Clerk's Office must be increased commensurately. All documents filed during the appellate process must be evaluated and processed by the Clerk's Office staff. There were six employees in 1982 to process 419 appeals filed then, and there are still six employees to process more than 1,179 appeals filed in recent years. With each appeal there are typically three briefs filed; the number of briefs filed and processed by the Clerk's Office has increased from approximately 1,200 briefs per year in 1982 to approximately 3,600 today.

Recommendation No. 10

The Task Force recommends that the Supreme Court examine the need for additional staffing in the Clerk's Office and Office of the Staff Attorney in order to address the challenges posed by self-represented litigants, to supervise more closely the early time segments of the appellate process, and to meet the needs of an expanded Court of Appeals.

Technology

The preparation of reporters' transcripts within the time frames urged in this report will require not only the judicial management procedures described above but also the acquisition and use of computer-assisted transcription or other digital technology. Funding for the technology is a subject complicated by the uneven distribution of work and by the hybrid compensation system (base salary and piecework charges) for court reporters. The Task Force recommends that the Supreme Court convene a committee to develop a funding model, possibly entailing incentives for court reporters, to obtain the hardware and software system, and to become certified in the system's use.

Technology also must be upgraded to allow electronic filing of notices of appeal and subsequent documents, and to improve the statewide appellate caseload management system. The Supreme Court and the Court of Appeals are currently using a computerized case management system that was developed in 1978, the same system in place when the Court of Appeals was created in 1982.

This system has been technologically obsolete for at least 10 years. In 1996 there was some movement towards replacing the system but that later subsided. The limitations with the current appellate tracking system are listed below:

- This system was written in COBAL – a programming language from the late 70s and early 80s.
- The Supreme Court only has one programmer who knows COBAL and can maintain the current system.
- Programmers who know COBAL are increasingly hard to find.

The Supreme Court has examined the limited alternatives available. Because of the limited size of the market as there are only 50 states plus the federal appellate courts few companies have developed appellate court software systems. Case management systems for appellate courts would cost approximately $1.2 to $1.5 million. Because of the huge price barriers, the appellate courts of Idaho have looked at other possibilities such as developing the system in-house. The benefit of developing a system in-house, as opposed to purchasing an off-the-shelf system, is that the product can be tailored specifically to the needs and workflow processes of Idaho courts. The goals for the development of this system include:

- Allowing all parties to appeals and citizens in general access to case files and records via the internet.
- Providing a platform for electronic filing of all cases.
- Simplifying and streamlining the internal processing of documents and files by Idaho's appellate courts and build a bridge between the appellate files and files at the district court through ISTARS.
- Providing the appellate courts access to all electronic district court files and records.
- Allowing district courts to electronically file records and transcripts with the appellate courts.
- Providing electronic notice of filings and orders to all parties in cases.

Recommendation No. 11

The Task Force recommends that the Supreme Court explore funding strategies for improved technology in the production of appellate records; that the Court implement an enhanced case-tracking and data processing system allowing internet-based access to all court files and records with appropriate access protocols; and that the Court develop a plan for electronic filing of appeals.

Conclusion

Idaho's appellate courts can be among the nation's best if they fulfill our state constitutional mandate to provide "right and justice" while avoiding "delay." Idaho's successful innovation, a Court of Appeals with assignment-based jurisdiction, now needs help in coping with growing caseload demands. Improvements are needed in judicial administration, and new resources must be invested in judicial and judicial support personnel, as well as facilities, for the Court of Appeals. In addition, we must provide the necessary facilities, staffing and technology to modernize and continuously to improve Idaho's appellate process.

If Idaho is to remain a place where justice is accessible and expeditious for all, every Idahoan has a stake in the continual improvement of our appellate court system. Idahoans recognize that delayed justice is simply not just. Moreover, our history of respecting each individual demands a judicial process that is both timely and personal. We understand that true justice requires a deep and thorough examination of individual cases. We believe that lingering doubts about criminal convictions and other legal outcomes, due to an overburdened appellate system, are unacceptable. We further understand that justice requires a system where judges have time for thoughtful reflection, where judges can view each case carefully, and are not reduced to a formulaic disposition of justice.

Finally, all Idahoans involved in litigation – civil, criminal, or administrative -- have an interest in fair and timely appellate review of trial court and administrative agency decisions. We all want to get on with our lives, knowing with confidence that each eventual outcome, whether or not we agree with it, is the product of a system that strives to deliver justice fairly and promptly under the rule of law.

In that simple and noble aspiration resides a worthy charter for our next quarter-century.

APPENDIX A:
SUPREME COURT ORDER CREATING THE QUARTER-CENTURY TASK FORCE

In the Supreme Court of the State of Idaho

IN RE: APPOINTMENT OF THE)
TASK FORCE ON IDAHO'S COURT OF APPEALS:) ORDER
THE NEXT QUARTER CENTURY AND BEYOND)

WHEREAS, in the twenty-five years since the creation of the Idaho Court of Appeals, the court's caseload has increased over 250% with the same number of Judges and no increases in support staff for almost twenty years.

WHEREAS, preparations must be made to address issues such as the future workload, composition, staffing and technological opportunities facing the Idaho Court of Appeals.

NOW, THEREFORE, IT HEREBY IS ORDERED that a task force be appointed to study the current and future needs of the Idaho Court of Appeals.

IT FURTHER IS ORDERED that the task force shall study the composition of the Court of Appeals with its current and projected caseloads and make recommendations ranging from the future structure and operations of the court, to staffing, technology and facility needs.

IT FURTHER IS ORDERED that the task force shall complete its study and make threshold recommendations to the Supreme Court no later than September 14, 2007 with long term recommendations to be made thereafter.

IT FUTHER IS ORDERED that the name of this committee shall be "The Task Force on Idaho's Court of Appeals: The Next Quarter Century and Beyond."

IT FURTHER IS ORDERED that the following individuals are appointed to the Task Force on Idaho's Court of Appeals:

1. Donald L. Burnett, Jr., Chair, University of Idaho College of Law
2. Justice Roger S. Burdick, Idaho Supreme Court
3. Chief Court of Appeals Judge, Darrel R. Perry
4. Patti Tobias, Administrative Director of the Courts
5. State Senator Denton Darrington
6. State Representative Jim Clark
7. Judge John P. Luster, First Judicial District
8. Judge Joel D. Horton, Fourth Judicial District

9. John Magnuson – Attorney, Coeur d'Alene
10. Marcy Spilker – Attorney, Department of Health and Welfare, Lewiston
11. Mike McNichols – Attorney, Lewiston
12. Tim Hopkins – Attorney, Idaho Falls
13. Katherine Moriarty – Attorney, Idaho Falls
14. Thomas A. Banducci – President, Board of Commissioners, Idaho State Bar
15. Kerry Hunter, Professor, Albertson College of Idaho
16. Molly Huskey, State Appellate Public Defender
17. Lawrence G. Wasden, Attorney General

Stephen W. Kenyon, Reporter

Dated this 9 day of February 2007.

By Order of the Idaho Supreme Court

Gerald F. Schroeder, Chief Justice

ATTEST:

Stephen W. Kenyon, Clerk of the Courts

APPENDIX B
IDAHO'S APPELLATE COURTS: AN HISTORICAL PERSPECTIVE

The Changing Structure of the Supreme Court

The Idaho Supreme Court convened for its first session on February 9, 1891. The original Supreme Court consisted of three justices all elected on a partisan political ballot.[48] In 1920 the number of Justices was increased from three to five and in 1934 the Idaho Constitution was amended to allow for non-partisan election of Justices and District Judges.[49] During the 1970s the population of Idaho as well as the workload on the Idaho Supreme Court increased dramatically. The number of appeals filed increased from 252 in 1974 to 419 in 1982.[50]

In 1970, when Governor Don Samuleson dedicated the new Supreme Court Building, neither he nor others in the state anticipated the second of the two most significant changes in court organization and structure in the history of the Idaho courts. After all, the building was designed with a constitutional future in mind. It included on its second floor seven justice's offices. The Court had gone from three justices to five in 1921. After fifty years, expansion to seven appeared imminent.

The Court of Appeals and Its Composition

Between 1970 and 1980, however, the state's population grew 32 percent from 713,000 to 944,000. Membership in the Bar almost tripled from 600 to 1,540. In 1977, as noted in the "introduction" to this report, a Blue Ribbon Committee appointed to review the issue of appellate backlog and caseload recommended creating a Court of Appeals by statute, rather than increasing the number of justices. Defeated in both the 1978 and 1979 legislative sessions, a bill creating the Court was passed and signed into law in 1980.[51]

In the spring of 1981, Governor John Evans appointed the original three members of the Court. The initiating statute set forth the three appointments: one for two years, one for four years, and one for six years, effective January 1, 1982. In keeping with an Idaho tradition, due regard for the balanced geographical membership of the Court is specifically mentioned in the statute.

In 25 years, there have only been eight members of the Idaho Court of Appeals. That figure includes both the original three and the current three. Position 1 went to Don Burnett, a practicing attorney from the Southeast: Pocatello. When he left the Court in 1990 to become Dean of the Louis D. Brandeis School of Law at the University of Louisville (later becoming the Dean of the University of Idaho College of Law), his seat went to Cathy Silak, a lawyer from Boise. Other factors, perhaps, such as a balance between judges and lawyers on the Court, and gender, had begun to override the geographic consideration. Judge Silak went to the Supreme Court in 1993 and was

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[48] Carpetbaggers to Computers: The Idaho Supreme Court from Territorial Days to the Present, by Justice Byron Johnson, *The Advocate*, February 1991, pg 5.
[49] *Id.*
[50] The Idaho Courts Annual Report 1982.
[51] Idaho Code § 1-2401 (2007).

replaced by Karen Lansing, another practitioner from Boise. Position 1 has always been a seat held by a former practicing attorney.

Position 2 went to Jesse Walters, a district judge from the Southwest: Ada County. Judge Walters also went on to serve on the Supreme Court. Upon his appointment to that Court in 1997, he was replaced by Alan Schwartzman, another Ada County district judge. When Judge Schwartzman retired in 2002, Sergio Gutierrez joined the Court from his district judge position in Canyon County. Position 2 has always been a seat held by a former Idaho district judge.

Position 3 went to Roger Swanstrom, a district judge from the North: Idaho County. At the time of his retirement in 1993, the caseload of the Court had evolved toward handling matters having some connection to, or origination in, the magistrate division of the district court – creating a call for appointment a magistrate judge to the Court. Indeed, Judge Swanstrom had once served as a magistrate judge in Adams County. Although other magistrates had applied and made the Idaho Judicial Council's "short list" for appointment to Court of Appeals vacancies, none had been appointed. This time the Judicial Council provided Governor Andrus with the names of the three sitting magistrates, and Judge Darrel Perry of Nez Perce County was appointed.

Thus, from its inception, the Court has consisted of one practitioner, one district judge, and one present or former magistrate, striking a balance within the bench and bar.

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Stephen W. Kenyon, Reporter

Dated this 9 day of February 2007.

By Order of the Idaho Supreme Court

Gerald F. Schroeder, Chief Justice

ATTEST:

Stephen W. Kenyon, Clerk of the Courts